IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.1148 OF 1997
IN
ARBITRATION PETITION NO.151 OF 1994
IN
AWARD NO.212 OF 1993

Municipal Corporation of Greater Bombay, a statutory Corporation constituted under the provisions of the Bombay Municipal Corporation Act, 1888 having their office at Mahapalika Marg, Mahapalika Annexe Building, Fort, Bombay-400 001. ....Appellant

V/s.

1. Atul Raj Builders Pvt.Ltd. a Company, having its office at B/2-22, Bharat Nagar, Grant Road, Bombay - 400 007.

2. Mr.Ramesh V. Tipnis of Bombay Indian Inhabitant, residing at Sector 10 Ab B.P.T. Officers' Co.Op.Soc. Vashi, New Bombay. ....Respondents

Mr.R.D. Dhanuka with Mr.Vasant Mahadik for the Appellant.

Mr.M.M. Vashi for the Respondents.

CORAM : A.P. SHAH AND S.J. VAZIFDAR, JJ.
DATED : 27TH JANUARY, 2005.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :

1. This is an Appeal against the order of the

learned single Judge dismissing the Appellant's Petition under Section 30 of the Arbitration Act, 1940 for setting aside an award dated 30th August, 1993 passed by the Arbitrator, Respondent No.2.

2. The Appellant/Original Petitioner invited tenders in respect of certain construction work. Respondent No.1 being the successful tenderer was issued a work order by the Appellant and instructed to commence the work with effect from 11th October, 1989. The terms and conditions of the work order dated 23rd September, 1989 incorporated various documents. The agreement between the parties was thus governed by the work order and the documents incorporated therein. One of such documents was the General Conditions Of Contract For Civil Works.

3. Disputes and differences arose between the parties herein. The same were referred to the sole arbitration of Respondent No.2 under clause 97 of the General Conditions Of Contract For Civil Works which reads as under :-

> "97. Arbitration :
>
> . All disputes or differences whatsoever which shall at any time

> arise between the parties hereto touching or concerning the works or the execution or maintenance thereof or this contract or the construction, execution, or maintenance thereof or this contract or the construction meaning operation or effect thereof or, to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before or after determination, foreclosure or breach of the contract (other than those in respect of which, the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them specify the nature of such dispute or difference and call for the point or points at issue to be referred to the arbitration. .....
> .....
>
> The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.
> ....."

4. The learned Arbitrator by a non-speaking award awarded an aggregate sum of Rs.29,97,926=91 to be paid by the Appellant to Respondent No.1.

5. Mr.Dhanuka challenged the award on the ground that the Appellant had foreclosed the work under clause 94 of the General Conditions Of Contract For Civil Works. He submitted that the Appellant having foreclosed the work, Respondent No.1 was disentitled

to the amounts claimed under the terms of the contract.

6. Clause 94 reads as under :-

> "94. If at any time after acceptance of the tender, the Commissioner shall decide to abandon or reduce the scope of the works for any reasons whatsoever and hence not require the whole or any part of the works to be carried out, he shall inform the contractor in writing to that effect and the contractor shall have no claim to any payment or compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence of the foreclosure of the whole or part of the works. The contractor shall be paid at the contract rates full amount of works executed at site and in addition, reasonable amount as certified by the Engineer for the value of such material (which material thereupon become the property of the Corporation) and also such further allowances as the Engineer may think reasonable and fair in respect of (a) any expenditure incurred by the Contractor towards preliminary works etc. and (b) other reasonable and proper engagement the contractor may have entered into for carrying out the work, and (c) such compensation as considered equitable under the circumstances."

7. The submission is not well founded for more

than one reason. We will assume for the purpose of this judgment that despite the award being a non speaking award, the Appellant is entitled to urge this point. It was strenuously argued on behalf of the Respondents that the Appellant was not entitled to do so.

8 (a). Firstly, the submission is based on an erroneous premise. The first sentence of clause 94 makes it clear that for the provisions thereof to apply it is the Commissioner who must decide to abandon or reduce the scope of the work. On the contrary the Appellant's case throughout was that it was Respondent No.1 who did so. Respondent No.1 ofcourse had denied that it ever did so but with that dispute we are not concerned at this stage. Even assuming that the work was abandoned it was not the Commissioner who decided to do so. It was neither the Appellant's case that it was the Commissioner who decided to abandon or reduce the scope of the work.

(b). For instance, in paragraphs 5(b) and 12 of the written statement filed by the Appellant before the learned Arbitrator, they have stated that pursuant to the option given by the Appellant, Respondent No.1 "opted to foreclose the contract".

(c). In paragraph 3 of the present Petition the Appellant reiterated this case. Paragraph 3 reads as under :

> "Under the terms and conditions of the contract incorporated in the above documents, the Claimants - contractor were required to carry out the work in a phased manner including completion of certain preliminaries as required under the Special Directions/special Conditions of the Contract before commencement of the work. The sequential work was not carried out by the Claimants, as a result of which there has been delay in completing the work within the stipulated period of time. The Claimants were thereafter given an option to complete the work after the monsoon of 1990 on the same terms and conditions or for a close the contract and the Claimants have opted to foreclose the contract as they refused to complete the work on the same terms and conditions and therefore asked for 30% rise in the contract amount which is clearly impermissible as the contract postulates no escalation whatsoever." (emphasis supplied)

(d). Even assuming therefore that there was a foreclosure as alleged it is clear that even according to the Appellant it was on the part of Respondent No.1 and not the Commissioner. Clause 94 would come into operation only if the foreclosure was on the part of

the Commissioner. The clause therefore does not come into operation at all.

9. Faced with this situation at an earlier hearing of this Appeal before another Division Bench, it appears that the Appellant changed its case by alleging that there was in fact a foreclosure of the work by the Appellant in writing as contemplated by clause 94. As this case was contrary to the earlier case, the Division Bench by an order dated 10th September, 2004 recorded that the Appellant was called upon to show the communication by which the Commissioner or the competent authority of the Appellant had foreclosed the contract under clause 94. The learned counsel appearing on behalf of the Appellant took time for the said purpose. Even today, no such communication has been produced before us.

10(a). Secondly, the work was not abandoned or even reduced as contemplated in clause 94. This is best demonstrated from the Appellant’s case itself at various place.

(b). This is clear for instance from paragraph 3 of the Petition referred to above.

We will for a moment assume that what is stated in the Petition is correct though we hasten to add that Respondent No.1 does not accept the same as true. From paragraph 3, it is clear that the Commissioner had not decided to abandon or reduce the scope of the work. In fact he expressly wanted the work to be completed. Whether the Commissioner was justified in imposing different terms and conditions after the monsoons is a different matter with which we are not concerned in the present case. The abandonment or reduction in the scope of work referred to in clause 94 refers to a decision to actually cancel or reduce the scope of the work as a policy decision of the Appellant and not a termination of the contract with the contractor for any alleged breach. Paragraph 3 above makes it clear that the Appellant had a grievance against Respondent No.1 for the alleged delay in completion of the work and therefore gave Respondent No.1 an option either to complete the work after the monsoon on the same terms and conditions or to foreclose the contract. What is relevant is that the Appellant far from deciding to abandon or reduce the scope of the work, wanted it to be completed.

(c). It is pertinent to note that in paragraph 5(b) of the written statement the Appellant contended that

Respondent No.1 opted to foreclose the contract only because Respondent No.1 refused to complete the work on the same terms and conditions and insisted for a 30% rise in the contract amount for the work to be executed after the monsoons. It is important to note that in the written statement and even in the Petition, it is not the Appellant's case that the Appellant abandoned the work as contemplated under clause 94. In paragraph 12 of the written statement, the stand of the Appellant was that Respondent No.1 abandoned the work and foreclosed the contract and therefore the Appellant had to get the work executed through another agency. Thus there was no abandonment even by the Appellant as contemplated under clause 94.

11(a). Faced with this, Mr.Dhanuka submitted that it was Respondent No.1's case itself that the Appellant had foreclosed the contract. This itself is a disputed question. For instance in paragraphs 26, 27 and 28 of the statement of claim, Respondent No.1 had expressly stated that they duly completed the work wherever part of the site was made available to it and that the Chief Engineer had informed it about the decision of the Appellant to reinvite the tenders for the balance work threatening further imposition of penalty. In paragraph 28, Respondent No.1 went on to

refer to the contents of the letter dated 30th October, 1990 wherein it was expressly stated :

> "Please note that there is no question of imposing any penalty on us. There is also no question of our foreclosing the work. It is obvious that you want to force us to foreclose the work and give an impression as if we have refused to carry out the work. Please note that we were and we are, still ready and willing to carry out the work, provided our reasonable request for grant of escalation to the extent of 30% on the balance work is granted." (emphasis suppliled)

(b). Mr.Dhanuka however relied upon certain statement of Respondent No.1 to the effect that the Appellant had foreclosed the work. This really is referring to the use of the term out of context for it is clear from the statement of claims and in fact from the Appellant's own petition that it was never anyones case that there was a foreclosure by the Appellant as contemplated by clause 94. This was the Appellant's case only in the Appeal as stated above and was in fact not even established.

12(a). To put Respondent No.1's case at its lowest, this would be a disputed question of fact solely within the jurisdiction of the Arbitrator to decide.

The award is a non speaking award. To hold in favour of the Appellant would necessitate our first coming to the conclusion that the arbitrator came to the conclusion that the work had been foreclosed under clause 94 and that despite the same he ignored the provisions of clause 94 and went on to pass the award. We are afraid that the same is not permissible.

(b). In *Bijendra Nath Srivastava (Dead) through L.Rs. v. Mayank Srivastava and others, (1994) 6 Supreme Court Cases 11*, the Supreme Court held as under :-

> "20. We would now proceed to deal with the question as to whether the High Court was right in setting aside the award made by the arbitrator. As regards an award made by an arbitrator under the Act the law is well settled that the arbitrator's award is generally considered binding between the parties since he is the tribunal selected by the parties. The power of the court to set aside an award is restricted to the grounds set out in Section 30 of the Act, namely, (a) where the arbitrator has misconducted himself or the proceedings ; (b) where the award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section 35 ; and (c) where the award has been improperly procured or is otherwise invalid. The court can set aside the award under clause (c) of Section 30 if it suffers from an error on the face of

the award. An award might be set aside on the ground of an error on the face of it when the reasons given by the decision, either in the award or in any document incorporated with it, are based upon a legal proposition which is erroneous. In the absence of any reasons for making the award, it is not open to the court to interfere with the award. The court cannot probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. An award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed grave mistake in arriving at his conclusion. The arbitrator is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or deed of settlement he is required to give such reasons. If the arbitrator or umpire chooses to give reasons in support of his decision it would be open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the basis of the recording of such reasons. The reasonableness of the reasons given by the arbitrator cannot, however, be challenged. The arbitrator is the sole judge of the quality as well as the quantity of the evidence and it will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal. (See : *Champsey Bhara and Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. ; Jivarajbhai Ujamshi Sheth v.*

Chintamanrao Balaji ; Sudarsan Trading Co. v. Govt. of Kerala ; Raipur Development Authority v. Chokhamal Contractors and *Santa Sila Devi v. Dhirendra Nath sen.)*

. It is therefore not open for us to delve into the mind of the Arbitrator in the manner in which we must if we were to uphold Mr.Dhanuka's submission.

13. Mr.Dhanuka then submitted that there was no evidence at all before the learned Arbitrator. He submitted that the award was therefore based on no evidence whatsoever. This submission too is not well founded.

14. The statement of claim refers to an affidavit which stood incorporated therein. That affidavit gives details of the equipment that was brought at site and the expenses incurred by Respondent No.1. The statement of claim itself also gives various details. The denials in reply to the statement of claim are themselves vague. There were several hearings before the learned Arbitrator. The Appellant has not stated what transpired before the learned Arbitrator. This is even assuming that the Appellant is entitled to do so in a Petition challenging the award under Section 30 of the Arbitration Act, 1940.

Evidence can be of various types. There may be oral evidence and documentary evidence. For instance, especially in a non speaking award, it would be unfair to suggest that the learned Arbitrator did not appreciate the evidence or that the learned Arbitrator ought to accept only one kind of evidence and not any other. It is pertinent to note that it is not even the Appellant's case that they sought an opportunity to cross-examine the person who had filed the said affidavit. In their affidavit, the witness on behalf of Respondent No.1. has made various statements which remain unchallenged by any cross-examination. In the circumstances, we reject this submission.

15. Lastly Mr.Dhanuka submitted that the award of Claim No.2 was a duplication inasmuch as the claim in Claim No.2 was already covered by Claim No.1.

16. Mr.Vashi, pointed out that in the Petition, the Appellant had not challenged the award on this ground. He further pointed out that this point was not even argued before the learned Single Judge. The Memo of Appeal too does not contain any such ground. In fact the only objection in respect of claim No.2, taken in paragraph 15 (e) of the Petition, was that the claim was awarded on a hypothetical basis, surmises and

conjuncture.

17. He submitted therefore with considerable force, that the Appellant ought not to be allowed to take this point across the bar at this stage in appeal. Mr.Vashi rightly pointed out that had the ground now sought to be contended been raised in the Petition, Respondent No.1 would have had an opportunity of meeting the same. By taking it for the first time at the stage of appeal after ten years, deprives Respondent No.1 an opportunity of answering the case effectively. The submission is well founded.

18. The submission is in any event not well founded. To appreciate the submission, it would be convenient to set out here the details of the nature of the claim, the amount claimed by Respondent No.1 and the amount awarded by the Arbitrator which reads as under :-

Claimant's Claim No.	Description of the Claim in brief	Amount claimed	Amount claimed
1.Claim No.1	Compensation for losses on account of overheads & profits	4156906.00	1652000.00
2.Claim No.2	Loss suffered on account of Idle	2800000.00	1080000.00

	Labour and Machinery etc.		
3.Claim No.3	Compensation for Loss suffered on account of wrong-ful deductions etc.	743056.00	Nil
4.Claim No.4	Settlement of Final Bill etc.	412923.73	263926.91
5.Claim No.5	Interest past Pendentelite	22% per annum on account claimed under claims 1 to 4 above.	Nil
6.Claim No.6	Cost of Arbitra-tion proceedings	150000.00	Nil
			2997926.91

19. Mr.Dhanuka submitted that the loss suffered on account of idle labour and machinery i.e. Claim No.2 could not be awarded again as it would obviously be covered by the claim in Claim No.1. The submission suffers from an inherent fallacy. Once again it is important to note that this is a non speaking award. Mr.Dhanuka’s submission that claim No.2 overlaps claim No.1 would be sustainable only where the labour and machinery of Respondent No.1 was required in any event and irrespective of any other circumstances to remain engaged for the contractual work and nowhere else. In that event even if the contract was not allowed to be

performed fully, Respondent No.1 would have had to keep their machinery and labour at the site. In such a case in the event of breach, the award of compensation or damages for termination would obviously cover the cost of labour and machinery.

20. The question however, is whether in the present case this was the only fact situation that was possible. It clearly was not. This was not even the Appellant's case anywhere in the pleadings. Various other possibilities exist. For instance it is not always necessary that all the labour or even a part of the workforce or all the machinery is always required to be kept at site during the execution of contract. This is not a case where the labour and machinery was to remain at site throughout the contractual period. It was open therefore for instance for Respondent No.1 to withdraw any machinery or workforce when it was not required.

21. Once again this is a non speaking award. It was for the arbitrator to ascertain what the fact situation really was. To hold in the Appellant's favour, we would necessarily have to accept that a particular fact situation in fact was prevalent and despite the same the arbitrator awarded for the same

loss twice over. This is neither permissible nor even possible in the present case. We therefore, reject this submission.

22. In the circumstances, the Appeal is dismissed. The Appellant shall pay the costs of this appeal to Respondent No.1 fixed at Rs.5000/-.

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DATE OF DECISION : 27TH JANUARY, 2005.

For Approval and Signature :

HON'BLE MR.JUSTICE A.P. SHAH

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)